

This Opinion is Not a
Precedent of the TTAB

Mailed: May 11, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Loew's Hotels, Inc.
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Serial No. 88425357
Serial No. 88433338
Serial No. 88433342
Serial No. 88433348
(Consolidated)
—

Natasha Reed of Foley Hoag LLP for Loew's Hotels, Inc.

Andrew T. Clark, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

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Before Rogers, Chief Administrative Trademark Judge, and Adlin and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Loew's Hotels, Inc. ("Applicant") seeks registration on the Principal Register of
the standard-character mark CLOVER CLUB (CLUB disclaimed),¹ and the three

¹ Application Serial No. 88425357 was filed on May 10, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's allegation of a bona fide intention to use the mark in commerce in connection with the services identified in the application.

stylized or composite marks shown below,² all for services ultimately identified as “Bar and restaurant services, namely, providing cocktails and small dishes in an outdoor lounge setting attached to a high-end hotel”:

Estd. CLOVER CLUB 2019

3



4

Made in Texas
CLOVER
CLUB
ESTD. 2019

5

² These marks are shown in Application Serial Nos. 88433338, 88433342, and 88433348, respectively, and are displayed in the text in order of serial number. The applications were all filed on May 16, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce in connection with the services identified in the application.

³ Applicant has disclaimed CLUB and ESTD. 2019, and describes the mark as follows: “The mark consists of the stylized words ‘CLOVER CLUB’ vertical in large block letters with the word ‘Estd.’ to the left and the year ‘2019’ to the right in smaller stylized font.”

⁴ Applicant has disclaimed CLUB and MADE IN TEXAS, and describes the mark as follows: “The mark consists of the words ‘Clover Club’ in large stylized font with the phrase ‘MADE IN’ above and ‘TEXAS’ below in small block caps in a circle with a shaded background.”

⁵ Applicant has disclaimed MADE IN TEXAS, CLUB, and ESTD. 2019, and describes the mark as follows: “The mark consists of the stylized words ‘CLOVER CLUB’ in large block letters with the phrase ‘Made in Texas’ above and the phrase ‘EST. 2019’ below in smaller stylized font.”

The Trademark Examining Attorney has refused registration of each of Applicant's marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that each mark so resembles the standard character mark CLOVER,⁶ and the stylized CLOVER mark shown below



both registered on the Principal Register to the same entity (the "Registrant") for "Catering; restaurant services; take-out restaurant services; mobile restaurant services provided via mobile trucks and carts," as to be likely, when used in connection with the services identified in the four applications, to cause confusion, to cause mistake, or to deceive.

When the Examining Attorney made each refusal to register final, Applicant appealed and requested reconsideration, which was denied in each application. The four appeals were consolidated at the request of Applicant, and have been fully briefed.⁸ We affirm the refusals to register Applicant's standard-character mark shown in Application Serial No. 88425357 and its stylized mark shown in Application

⁶ The cited Registration No. 3806427 issued on June 22, 2010 and has been renewed.

⁷ The cited Registration No. 5181441 issued on April 11, 2017.

⁸ Citations in this opinion to the briefs and other docket entries refer to TTABVUE, the Board's online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. We will cite the briefs in the appeal in Application Serial No. 88425357. Applicant's appeal brief appears at 21 TTABVUE, its supplemental brief appears at 28 TTABVUE, and its reply brief appears at 33 TTABVUE. The Examining Attorney's brief appears at 30 TTABVUE.

Serial No. 88433338, but reverse the refusals to register Applicant's marks containing the words "Made in Texas" shown in Application Serial Nos. 88433342 and 88433348.

I. Prosecution and Procedural History

We briefly summarize below the prosecution history of the four applications,⁹ and the procedural history of the appeals, because they provide useful background for our analysis of the refusals.

Applicant originally sought registration of its marks for services identified as "Bar and restaurant services" in each application.¹⁰ The Examining Attorney issued Office Actions refusing registration under Section 2(d) on the basis of the two cited registrations, and requiring disclaimers of various elements of the four marks, including the word CLUB.¹¹ The Examining Attorney made of record USPTO electronic records regarding the cited registrations.¹²

Applicant responded to the Office Actions by arguing against the refusals and entering disclaimers of various elements of the marks.¹³ Applicant made of record USPTO electronic records regarding registrations of various CLOVER-formative

⁹ Citations in this opinion to the application records, including the requests for reconsideration and their denials, are to pages in the Trademark Status and Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO"). The records in the four applications are substantively identical.

¹⁰ Serial Nos. 88425357, 88433338, 88433342, and 88433348 at TSDR 1.

¹¹ July 30, 2019 Office Actions at TSDR 1.

¹² *Id.* at TSDR 5-9.

¹³ January 30, 2020 Responses to Office Actions at TSDR 1-8 (Serial No. 88425357), 1-11 (Serial Nos. 88433338, 88433342, and 88433348).

marks,¹⁴ webpages reflecting third-party uses of various CLOVER-formative marks in connection with restaurant, bar, and cafe services,¹⁵ webpages regarding Applicant's restaurant services,¹⁶ and webpages regarding Registrant's restaurant services.¹⁷

The Examining Attorney then issued Office Actions making final each refusal to register.¹⁸ He made of record webpages offering restaurant services, catering services, bar services, and food truck services under the same mark.¹⁹

Applicant appealed each final refusal and requested reconsideration in each application.²⁰ Applicant made of record additional webpages reflecting third-party uses of various CLOVER-formative marks for restaurant services.²¹

The Examining Attorney denied each of Applicant's requests for reconsideration.²² He made of record webpages regarding Applicant's restaurant in Arlington, Texas,²³

¹⁴ *Id.* at TSDR 9-59 (Serial No. 88425357), 12-62 (Serial Nos. 88433338, 88433342, and 88433348).

¹⁵ *Id.* at TSDR 60-77 (Serial No. 88425357), 63-80 (Serial Nos. 88433338, 88433342, and 88433348).

¹⁶ *Id.* at TSDR 78-85 (Serial No. 88425357), 81-88 (Serial Nos. 88433338, 88433342, and 88433348).

¹⁷ *Id.* at TSDR 86-93 (Serial No. 88425357), 89-96 (Serial Nos. 88433338, 88433342, and 88433348).

¹⁸ February 24, 2020 Final Office Actions at TSDR 1.

¹⁹ *Id.* at TSDR 2-50.

²⁰ August 24, 2020 Requests for Reconsideration at TSDR 1-7.

²¹ *Id.* at TSDR 8-32.

²² September 14, 2020 Denials of Requests for Reconsideration at TSDR 1.

²³ *Id.* at TSDR 2-11.

an unrelated supper club in Dallas, Texas called The Clover Club,²⁴ the results of a Google Map search showing the proximity of Applicant's restaurant to The Clover Club in Dallas,²⁵ and additional webpages offering restaurant services, catering services, bar services, and food truck services under the same mark.²⁶

The appeals then resumed, and after the Board granted Applicant's request to consolidate them, Applicant filed its appeal brief, in which it argued against the refusals and concluded by "request[ing] that the Board remand its CLOVER CLUB Applications back to the Examining Attorney to enter the following amendment to its description of services: 'Bar and restaurant services, namely providing cocktails and small dishes in an outdoor setting attached to a high-end hotel located in Arlington, Texas' in Class 43." 21 TTABVUE 28. The Board granted the request to remand and suspended action on the appeals. 22 TTABVUE 1-2.

On remand, the Examining Attorney accepted the proposed amendment, but otherwise denied Applicant's requests for reconsideration based on the amendment.²⁷ The Examining Attorney made of record webpages showing restaurants located within hotels.²⁸ The Board resumed the appeals and granted Applicant leave to file a supplemental brief, 27 TTABVUE 1, in which Applicant discussed the impact of the

²⁴ *Id.* at TSDR 12-19.

²⁵ *Id.* at TSDR 20-21.

²⁶ *Id.* at TSDR 22-29.

²⁷ May 11, 2021 Denials of Requests for Reconsideration at TSDR 1.

²⁸ *Id.* at TSDR 2-6.

amendment to its identification of services. The Examining Attorney then filed his brief, 30 TTABVUE,²⁹ and Applicant filed a reply brief. 33 TTABVUE.³⁰

Following the completion of briefing, the Board remanded the four applications to the Examining Attorney sua sponte because their common identifications of services included a geographic restriction of the services to “Arlington, Texas” that was inconsistent with Applicant’s claim to nationwide registrations and could be considered only in the context of a concurrent use proceeding. 36 TTABVUE 3-4. Following the issuance of new final Office Actions on remand,³¹ Applicant deleted the language “located in Arlington, Texas” from the identification of services in each application, and the appeals were resumed and Applicant was given the opportunity to file a supplemental brief to address the revised identifications. 39 TTABVUE 1-2. Applicant did not do so.

²⁹ The Examining Attorney refers in his brief to “evidence from The American Heritage Dictionary” defining the word “club,” 30 TTABVUE 11-12, provides an active hyperlink to the website at ahdictionary.com, *id.* at 12 n.1, and requests that the Board take judicial notice of several definitions of the word. *Id.* at 12. “Providing only a website address or hyperlink to Internet materials is insufficient to make such evidence of record,” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at *32 n.67 (TTAB 2021), but we may take judicial notice of dictionary definitions sua sponte, *In re DePorter*, 129 USPQ2d 1298, 1303 n.15 (TTAB 2019), and we have considered the definitions from THE AMERICAN HERITAGE DICTIONARY for whatever probative value they may have.

³⁰ Applicant attached to its reply brief “copies of dictionary definitions of the term ‘club.’” 33 TTABVUE 7, 15-18. Applicant does not request that the Board take judicial notice of these definitions, but as noted above we may do so sua sponte, and we have considered the definitions from the CAMBRIDGE DICTIONARY for whatever probative value they may have.

³¹ March 3, 2022 Final Office Actions at TSDR 1. The March 3, 2022 Final Office Actions superseded February 11, 2022 Final Office Actions that contained a typographical error.

II. Analysis of Section 2(d) Refusal³²

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” Our determination of the likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Chutter*, 2021 USPQ2d 1001, at *29 (citing *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). Applicant discusses the first *DuPont* factor, the similarity or dissimilarity of the marks, as well as the fourth

³² We will focus our analysis on the cited standard-character mark CLOVER for “Catering; restaurant services; take-out restaurant services; mobile restaurant services provided via mobile trucks and carts.” If we find a likelihood of confusion as to this mark, we need not find it as to the cited stylized CLOVER mark for the same services. Conversely, if we do not find a likelihood of confusion as to the standard-character mark, we would not find it as to the stylized mark. *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *3 (TTAB 2020) (citing *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010)).

DuPont factor, the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing,” and the sixth *DuPont* factor, the “number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567. 21 TTABVUE 12-28; 33 TTABVUE 5-9.

A. Similarity or Dissimilarity of the Services and Channels of Trade

The second and third *DuPont* factors respectively consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” and “the similarity or dissimilarity of established, likely-to-continue trade channels.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). “Apparently conceding the issue, Applicant does not address these *du Pont* factors in its brief, so we offer only a brief explanation of our conclusion.” *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016).³³

1. Similarity or Dissimilarity of the Services

The services identified in the cited registration include “restaurant services.” “[R]egistrant’s services are not limited and thus must be construed to encompass all types of restaurant services, including stand-alone restaurants as well as restaurants that may be located within a hotel” *In re Binion*, 93 USPQ2d 1531, 1535 (TTAB 2009). The services identified in each of Applicant’s applications were originally

³³ In its supplemental brief, Applicant argues that it “has narrowed its services to distinguish itself from the cited prior-registered marks,” 28 TTABVUE 4, but as discussed above, the referenced geographic limitation was subsequently deleted. In its reply brief, Applicant again does not address the second and third *DuPont* factors. 33 TTABVUE 5-9.

similarly identified broadly as “Bar and restaurant services,” but were amended on the second remand to “Bar and restaurant services, namely, providing cocktails and small dishes in an outdoor lounge setting attached to a high-end hotel.” Because an amendment to an identification of services is proper only if the amended identification clarifies or limits the original identification, Trademark Rule 2.71(a), 37 C.F.R. § 2.71(a), Applicant’s amendments themselves establish that its amended services are encompassed within Registrant’s services identified broadly as “restaurant services.”

Accordingly, “we must treat [Applicant’s and Registrant’s] restaurant services as being legally identical.” *Jansen Enters., Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007) (unrestricted identification of “restaurant services” in the petitioner’s registration “presumed to encompass restaurants that feature bagels as a main entree,” the services identified in the respondent’s registration). *See also In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) (“restaurant services specializing in Southern-style cuisine” held to be legally identical to “restaurant services”); *Anthony’s Pizza & Pasta Int’l, Inc. v. Anthony’s Pizza Holding Co.*, 95 USPQ2d 1271, 1278-79 (TTAB 2009), *aff’d*, 415 F. App’x 222 (Fed. Cir. 2010) (services identified as “restaurant services” and “restaurant services, namely, eat-in and take-out coal oven pizza and other items” held to be legally identical). “In view of the [legal] identity of the recited [‘restaurant services’], there is no need for us to further consider the relatedness of the [services].” *In re FabFitFun, Inc.*, 127 USPQ2d

1670, 1672 (TTAB 2018). “The legal identity of the restaurant services weighs heavily in” favor of a finding of a likelihood of confusion. *Jansen Enters.*, 85 USPQ2d at 1108.

2. Similarity or Dissimilarity of the Channels of Trade

Because the “restaurant services” identified in the cited registration contain no limitations or restrictions of the sort contained in the amended identifications of services in Applicant’s four applications, we must presume that Registrant’s “restaurant services” “are offered in all channels of trade that would be normal for such services, and that they would be purchased by all potential customers.” *Chutter*, 2021 USPQ2d 1001, at *39. “This would include the channels of trade and classes of consumers for [Applicant’s] restaurant services.” *Id.* Thus, the third *DuPont* factor also strongly supports a finding of a likelihood of confusion.

B. The Number and Nature of Similar Marks in Use for Similar Services

We turn next to the sixth *DuPont* factor, to which Applicant devotes much of its briefing, 21 TTABVUE 12-25; 28 TTABVUE 4-6; 33 TTABVUE 5-8, because it potentially affects the scope of protection to be afforded the cited CLOVER standard-character mark and thus the degree of similarity under the first *DuPont* factor between that mark and Applicant’s four marks that is required for confusion to be likely.³⁴

³⁴ As noted above, in addition to evidence of use of other marks, Applicant also made of record third-party registrations of various CLOVER-formative marks, January 30, 2020 Responses to Office Actions at TSDR 10-59, which Applicant mentions in passing in its appeal brief. 21 TTABVUE 10, 23. In its reply brief, however, Applicant indicates that it is relying principally on its third-party use evidence. 33 TTABVUE 5. In any event, we have determined above that the involved restaurant services are legally identical, and only one of the third-party registrations—for the mark BLACK CLOVER—covers restaurant services. January 30, 2020

“The purpose of introducing evidence of third-party use is ‘to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (internal quotation omitted)).

In its appeal brief, Applicant argues that “the word ‘CLOVER’ is commonly used as a trademark in connection with restaurants, food and beverages, bars, lounges, pubs, cafés, and related dining and drinking establishments” 21 TTABVUE 12. Applicant argues that “[t]he record shows there are at least twenty-seven (27) separate instances of actual uses of CLOVER in connection with Restaurants and Food/Beverage Goods or Services in the United States,” *id.*, as evidenced by “print-outs from the website homepages and/or social media pages operated by each of the different owners of the Third-Party Marks,” or “in cases where the owners’ websites were unavailable” by “restaurant and menu websites, like Yelp.com or Menumix.com,

Responses to Office Actions at TSDR 56-59. The other registrations thus have little or no probative value regarding the conceptual weakness of the cited mark. *See, e.g., In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1745 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1715 (Fed. Cir. 2017)).

where the establishments and/or their menus were featured (collectively, the “Third-Party Usage Evidence”).” *Id.* at 13.³⁵

Applicant’s appeal brief presents the third-party uses in two sets of tables. *Id.* at 8-11, 15-16, 18-22. Applicant provides active hyperlinks to various websites either in the tables themselves, *id.* at 8-11, or in the accompanying footnotes, which are internal record citations. *Id.* at 15-16, 18-22 & nn. 2-3, 5-31. Much of what appears in the tables, including street addresses, displays of the restaurants’ logos and signage, and descriptions of their services,³⁶ is not contained in the webpages in the record, and must have been obtained by Applicant from other sources, perhaps through the hyperlinks. As noted above, a hyperlink is insufficient to make the website to which it resolves of record, and we have disregarded anything set forth in the tables that is not contained in the webpages in the record. For convenience in following our analysis, we reproduce the second set of tables below.³⁷

³⁵ The BLACK CLOVER mark discussed above is listed by Applicant as being in use, 21 TTABVUE 9, but no evidence of its use is in the record, and we have given it no consideration under the sixth *DuPont* factor. We are left with some evidence of use of 26 other marks.

³⁶ The statements in the “Restaurant Description” columns are Applicant’s own characterizations of the cuisine and ambience of the restaurants, or statements from the webpages of the referenced restaurants. We have based our analysis on the webpages themselves.

³⁷ Applicant also made of record a Facebook page regarding a restaurant in Clover, South Carolina called The Clover Station, August 24, 2020 Requests for Reconsideration at TSDR 10, as well as a page from the website at 211clover.com regarding a restaurant in Louisville, Kentucky called 211 Clover Lane, and pages from the website at clovermeadowbakery.com regarding a bakery in Maple Lake, Minnesota, *id.* at TSDR 13-15, 22-25, that are not listed in the tables. Because these materials are in the record, we have considered the three third-party uses that they reflect.

Restaurants operating under the marks CLOVER or THE CLOVER are summarized in the table reproduced below:

	<u>Trademark</u>	<u>Location</u>	<u>Logo Design</u>	<u>Restaurant Description</u>
1.	CLOVER ⁵	Spokane, WA		Upscale, romantic restaurant, described as a cozy lunch bistro, destination brunch, romantic dinner spot that serves American cuisine with subtle Mediterranean flare.
2.	CLOVER ⁶	Chicago, IL		Casual American sports bar and restaurant.
3.	CLOVER ⁷	Webster Groves, MO		Italian cuisine, described as a neighborhood restaurant with fresh baked goods, breakfast sandwiches, and a seasonal lunch menu, and in the evening, offering a selection of beer, wine and house cocktails.
4.	THE CLOVER ⁸	Rome, NY		Casual Irish diner and family style restaurant.

Id. at 15.³⁸

Restaurants operating under a CLOVER CLUB mark are summarized as follows:

	<u>Trademark</u>	<u>Location</u>	<u>Logo Design</u>	<u>Restaurant Description</u>
1.	CLOVER CLUB ⁹	Brooklyn, NY		Clover Club is the premiere cocktail bar in Brooklyn featuring exquisite cocktails, real food and an atmosphere of true hospitality, with live jazz.
2.	CLOVER CLUB ¹⁰	Irma, WI		Casual restaurant featuring Thai and vegan food.
3.	CLOVER CLUB ¹¹	Mark, IL		Casual Irish dining.
4.	THE CLOVER CLUB ¹²	Dallas, TX		Dallas' premier supper club and live music venue featuring cocktail bites, to dinner meals, with craft cocktails and mixology, along with a wide selection of wines and bottles.
5.	CLOVER CLUB SPORTS TAVERN & EATERY ¹³	Tiffin, OH		Casual sports tavern featuring burgers, bar food and beer.

³⁸ January 30, 2020 Responses to Office Action at TSDR 61-64.

Id. at 16.³⁹

Restaurants operating under a mark containing CLOVER and what Applicant calls “additional descriptive terms,” *id.* at 18, are summarized as follows:

	<u>Trademark</u>	<u>Location</u>	<u>Logo Design</u>	<u>Restaurant Description</u>
1.	THE CLOVER CAFÉ ¹⁴	Winsted, CT 06098		Irish pub and restaurant.
2.	CLOVER'S FINE ART GALLERY & CAFÉ ¹⁵	Brooklyn, NY		Casual café within an art gallery, with coffee, teas, wine, and light fare, including panini sandwiches, Jamaican beef and vegetable patties, tea breads and cookies from a local bakery.

	<u>Trademark</u>	<u>Location</u>	<u>Logo Design</u>	<u>Restaurant Description</u>
3.	CAFÉ CLOVER ¹⁶	New York, NY		American, high-end restaurant serving organic health food and plant-based cuisine, with a focus on simple ingredients and fresh options that are prepared from locally sourced ingredients.
4.	CAFE CLOVER ¹⁷	Elkins Park, PA		A family owned and operated cafe that provides a fun and enjoyable ambiance and high quality food and beverages, with specialties including authentic Korean desserts flavored with milk snows and shaved ice (bingsu), walnut cakes, and taiyaki and specialty drinks.
5.	CLOVER DELICATESSEN ¹⁸	New York, NY		Causal NYC deli.
6.	CLOVER GRILL ¹⁹	New Orleans, LA		50s style diner with quirky, cozy, unique style and a vignette of nostalgia and classic diner food.
7.	CLOVER GRILL ²⁰	Clover, SC		Casual diner featuring burgers, sandwiches, and beverages

³⁹ *Id.* at TSDR 66-69; August 24, 2020 Requests for Reconsideration at TSDR 9.

	<u>Trademark</u>	<u>Location</u>	<u>Logo Design</u>	<u>Restaurant Description</u>
8.	CLOVER BAR ²¹	Grand Haven, MI		Restaurant specializing in famous one of a kind Pizzas. The menu includes pizza, subs, breadsticks, salads, spaghetti & lasagna, together with a full bar and selection of beer and wine.
9.	CLOVER JUICE ²²	Los Angeles, CA		Locally-sourced, cold-pressed juice bar.
10.	CLOVER TOP CREAMERY ²³	Charlottesville, VA		A creamery focusing on dairy foods including fresh cheeses.

Id. at 18-20.⁴⁰

Restaurants operating under a mark containing CLOVER and what Applicant calls “additional terms,” *id.* at 20, are summarized as follows:

	<u>Trademark</u>	<u>Location</u>	<u>Logo Design(s)</u>	<u>Restaurant Description</u>
1.	CLOVERLEAF TAVERN ²⁴	Caldwell, NJ		Restaurant and bar, famous for its award-winning hamburgers and fresh beer battered fish-n-chips. Voted Best Beer Bar in the Northeast for two consecutive years, specializing in craft beer.
2.	CLOVERMINT CAFÉ & MARKET ²⁵	Dania Beach, FL	 	Serving vegan comfort food with dishes like Caesar salad, avocado fries, sunflower seed “tuna” melt, baked ziti, and a selection of tea.
3.	THE RED CLOVER INN & RESTAURANT ²⁶	Mendon, VT		Fine dining restaurant near Killington, Vermont, with fresh, local, and masterfully crafted dishes.
4.	HARP & CLOVER ²⁷	Gadsden, AL		Irish Pub serving traditional Irish favorites, gourmet sandwiches, and regular chef specials. The menu boasts a fine selection of artisanal burgers, gourmet sandwiches, and traditional Irish fare.

⁴⁰ January 20, 2020 Responses to Office Action at TSDR 65, 70-72; August 24, 2020 Requests for Reconsideration at TSDR 11-12, 16-21, 26-32.

Id. at 21.⁴¹

Applicant argues that “[t]his evidence establishes that the term CLOVER is weak, and that Applicant’s Marks, which has [sic] more differences with the Cited Marks than [sic] some of the Third-Party Marks, can coexist in this already crowded field, without causing consumer confusion.” *Id.* at 23. Applicant cites *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015), as the case most closely analogous to the present one because the Federal Circuit held in that case that the Board had given inadequate consideration to a similar number of third-party uses of various PEACE & LOVE marks for restaurant services and foods and beverages offered by the applicant as evidence of weakness of the opposer’s several PEACE & LOVE-formative marks for restaurant services, and the dissimilarity of those marks to the applicant’s PEACE LOVE AND JUICE mark for juice bar services. 21 TTABVUE 24-25.

The Examining Attorney responds that “[t]he wording ‘CLOVER’ is not weak, diluted, or so widely used that it should be afforded only a narrow scope of protection.” 30 TTABVUE 15. He devotes much of his discussion to Applicant’s third-party registration evidence. *Id.* at 16-17. With respect to Applicant’s third-party use evidence, he argues that

though the evidence of third-party use in the marketplace is relevant, in this case when taken in consideration with the whole of the record, the third-party market place evidence is insufficient to overcome the similarity of the marks, the near identical nature of the services, and the

⁴¹ January 20, 2020 Responses to Office Action at TSDR 73-77.

strength of the registered mark for the relevant restaurant services in International Class 043.

id. at 18, and that

[e]ven if the third-party marketplace evidence is found to show the mark is weak and entitled to a limited scope of protection, the high degree of similarity between the marks and near identical nature of the services surely weigh in favor of the registrant. Ultimately, even if the 6th *du Pont* factor possibly favors the Applicant it does not sufficiently outweigh the other relevant factors favoring the Registrant.

Id. at 19.

In its reply brief, Applicant argues that the third-party use evidence shows

the following: (1) the mark CLOVER has weak trademark significance because consumers have become conditioned to recognize other entities using CLOVER for dining and drinking establishments, and can therefore easily distinguish between such marks, even when there are small differences between them; and (2) the mark CLOVER carries a suggestive or descriptive connotation in the food and beverage service industry, and is weak for that additional reason.

33 TTABVUE 5. Applicant “requests that the Board look to the Federal Circuit’s reasoning in *Juice Generation, Inc. v. GS Enters. LLC* and find that the Third-Party Marks constitutes [sic] significant evidence that CLOVER is weak.” *Id.* at 6.

As discussed above, Applicant’s proof of third-party uses consists of a single page or, in some instances, a few pages, from company or social media websites regarding each of 26 entities that operate under various marks consisting of or containing the word CLOVER.⁴² “Applicant’s evidence tells us little about the specific extent to

⁴² As noted above, there is no evidence of use of the registered BLACK CLOVER mark for restaurant services.

which the third-party marks may have been used or the amount of exposure relevant customers may have had to them,” *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1036 (TTAB 2016),⁴³ but the Federal Circuit has held that “even where the specific extent and impact of the usage has not been established,” evidence of third-party use “is relevant to show that a term ‘may have a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that [term] is relatively weak,” and “that customers have been educated to distinguish between different marks on the basis of minute distinctions.” *Id.* (quoting *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (internal quotation omitted)). Evidence of third-party use can be “powerful on its face” even though “‘specifics’ as to the extent and impact of use of the third-party marks may not have been proven,” *Juice Generation*, 115 USPQ2d at 1674, if such evidence is “extensive.” *Jack Wolfskin*, 116 USPQ2d at 1136 (citing *Juice Generation*, 116 USPQ2d at 1674). *Cf. i.am.symbolic*, 123 USPQ2d at 1752 (dismissing evidence of third-party uses that fell “short of the ‘ubiquitous’ or ‘considerable’ use of the mark components” in *Jack Wolfskin* and *Juice Generation*).

The Federal Circuit has not set or suggested a minimum number of third-party uses that may be deemed “extensive” or “ubiquitous,” *Jack Wolfskin*, 116 USPQ2d at

⁴³ In two instances, we cannot determine the location of the user from the webpages in the record. January 30, 2020 Responses to Office Actions at TSDR 63 (webpage of what is described as a “neighborhood restaurant” displaying a composite word-and-design mark containing the stylized word CLOVER), 67 (webpage of a “Clover Club Thai Restaurant in Irma”). There is no dispute, however, that these restaurants were then in operation somewhere in the United States.

1136, or “considerable,” *Juice Generation*, 115 USPQ2d at 1674, but the Board has noted that “in *Juice Generation*, there were at least twenty-six relevant third party uses or registrations of record . . . and in *Jack Wolfskin*, there were at least fourteen.” *Morinaga Nyugyo*, 120 USPQ2d at 1746 n.8 (citations omitted). In absolute terms, the number of third-party uses in the record here is comparable to the number in *Juice Generation* and greater than the number in *Jack Wolfskin*.⁴⁴

Our analysis cannot end there, however, because the uses must be “relevant” in the sense that they use the word CLOVER in a manner that “show[s] that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.” *Omaha Steaks*, 128 USPQ2d at 1693 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1694). Relevance has two elements: (1) the similarity of the goods or services for which the third-party marks are used to the involved goods or services, *id.* at 1693-94; and (2) the similarity of the third-party marks to the cited mark. *Id.* at 1693; *see also Juice Generation*, 115 USPQ2d at 1674 (noting evidence of “a considerable number of similar marks” in connection with restaurant services or food products).

In *Omaha Steaks*, the Federal Circuit reiterated that “the relevant *du Pont* inquiry is [t]he number and nature of similar marks in use *on similar goods*.” *Omaha*

⁴⁴ The Examining Attorney suggests that the number of separate uses may be smaller because “there is no indication or evidence of record to prove there is an existing or non-existing relationship between the restaurants in the proffered third-party evidence.” 30 TTABVUE 20. There is nothing in the record, however, to suggest that each of the various restaurants and other retail establishments is not independently owned and operated.

Steaks, 128 USPQ2d at 1693-94 (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) (internal quotation and quotation marks omitted)). We have determined above that the involved services are legally identical “restaurant services,” and all of the webpages in the record are relevant in that they state or show on their faces that the referenced entities serve food or beverages for consumption on or off the premises, the *sine qua non* of “restaurant services.”⁴⁵

The degree of similarity of the third-party marks to the cited mark is a more complex issue. As noted above, Applicant analogizes this case to *Juice Generation*, and we list below the third-party marks that the Federal Circuit found in that case to be sufficiently similar to the opposer’s marks PEACE & LOVE, P & L PEACE & LOVE, ALL YOU NEED IS PEACE & LOVE, and P & L PEACE & LOVE NEW YORK for restaurant services to establish the weakness of the “PEACE & LOVE” element of those marks:

PEACE LOVE NOODLES HE AI MIAN; PEACE LOVE AND PIZZA; PEACE LOVE YOGURT; PEACE, LOVE & ICE CREAM; PEACE, LOVE AND LITTLE DONUTS; PEACE.LOVE.DÖNER; PEACE, LOVE & BEER; PEACE, LOVE, AND CHOCOLATE; PEACE LOVE & OATS; PEACE. LOVE. & GOOD FOOD; PEACE, LOVE AND FRENCH FRIES; PEACE, LOVE & CUPCAKES; PEACE LOVE BURRITOS; PEACE, LOVE, AND BURGERS; PEACE · LOVE · PANCAKES; PEACE LOVE & BARBECUE; PEACE, LOVE & CRUNCH; PEACE LOVE

⁴⁵ Several of the entities are described as bars, taverns, or pubs. January 30, 2020 Responses to Office Actions at TSDR 62, 66, 73; August 24, 2020 Requests for Reconsideration at TSDR 9, 12, 26. The webpages of several of these entities also discuss the service of food, and it is common knowledge that bars, taverns, and pubs commonly serve food, as evidenced in part by Applicant’s own amended identification of services, so we will deem the services of these entities to include restaurant services.

GRANOLA; PEACE, LOVE AND PINOT; PEACE. LOVE. TREATS; PEACE, LOVE, AND CHOPS; PEACE, LOVE, AND HOT DOGS; PEACE. LOVE. PASTA; PEECE LUV CHIKIN; PEACE, LOVE & CHEESECAKE; and PEACE LOVE AND APPLE PIE.

Juice Generation, 115 USPQ2d at 1673 n.1. The Federal Circuit noted that all of these third-party marks “contain[ed] ‘peace’ and ‘love’ followed by a third, product-identifying term,” and that the “bulk of [them were] three-word phrases much like *Juice Generation*’s mark.” *Id.* at 1674.

Only a portion of the third-party marks in this record have the high degree of similarity to the involved marks that was characteristic of the third-party marks in *Juice Generation*. Three of the uses consist of CLOVER alone,⁴⁶ and two others consist of THE CLOVER.⁴⁷ These uses are identical or quite similar to the cited CLOVER mark. Other third-party marks contain the word CLOVER together with other words: Clover Club (four uses),⁴⁸ The Clover Club,⁴⁹ Cafe Clover (two uses),⁵⁰ Clover Grill

⁴⁶ January 30, 2020 Responses to Office Actions at TSDR 61 (Yelp page for restaurant in Spokane, Washington), 62 (Chicago, Illinois), 63 (no city appearing on webpage).

⁴⁷ *Id.* at TSDR 64 (Rome, New York); August 24, 2020 Requests for Reconsideration at TSDR 26 (Winsted, Connecticut).

⁴⁸ *Id.* at TSDR 66-67, 69 (Brooklyn, New York, the city of “Irma,” and Tiffin, Ohio); August 24, 2020 Requests for Reconsideration at TSDR 9 (Mark, Illinois).

⁴⁹ January 30, 2020 Responses to Office Actions at TSDR 68.

⁵⁰ January 30, 2020 Responses to Office Actions at TSDR 70 (New York, New York); August 24, 2020 Requests for Reconsideration at TSDR 65 (Yelp page for restaurant in Elkins Park, Pennsylvania).

(two uses),⁵¹ Clover Delicatessen,⁵² The Clover Station,⁵³ The Original Clover Bar,⁵⁴ Clover Juice,⁵⁵ Clover Meadow Bakery,⁵⁶ Clover’s Fine Art Gallery,⁵⁷ and Clover Top Creamery.⁵⁸ The Clover Club marks are identical to Applicant’s standard-character mark and quite similar to the cited CLOVER mark and Applicant’s other marks. The remaining uses are Cloverleaf Tavern,⁵⁹ Clovermint Café & Market,⁶⁰ Red Clover Inn & Restaurant,⁶¹ Harp & Clover,⁶² and 211 Clover Lane.⁶³

Applicant argues that the third-party marks “suggest[] that the term ‘CLOVER’ has a normally understood and well-recognized descriptive or suggestive meaning” in connection with restaurant services, 21 TTABVUE 23, namely, “good fortune and luck.” *Id.* at 24.⁶⁴ Many of the uses display the clover flower traditionally associated

⁵¹ *Id.* at TSDR 71 (New Orleans, Louisiana); August 24, 2020 Requests for Reconsideration at TSDR (Clover, South Carolina).

⁵² January 30, 2020 Responses to Office Actions at TSDR 72 (Yelp page for delicatessen in New York, New York).

⁵³ August 24, 2020 Requests for Reconsideration at TSDR 10 (Clover, South Carolina).

⁵⁴ *Id.* at TSDR 12 (Grand Haven, Michigan).

⁵⁵ *Id.* at TSDR 16-21 (Postmates pages for Clover Juice in Los Angeles, California).

⁵⁶ *Id.* at TSDR 22-25 (Maple Lake, Minnesota).

⁵⁷ *Id.* at TSDR 27-29.

⁵⁸ *Id.* at TSDR 30-32 (Charlottesville, Virginia).

⁵⁹ January 30, 2020 Responses to Office Actions at TSDR 73 (Caldwell, New Jersey).

⁶⁰ *Id.* at TSDR 74 (Dania Beach, Florida).

⁶¹ *Id.* at TSDR 75-76 (Killington, Vermont).

⁶² *Id.* at TSDR 77 (Gadsden, Alabama).

⁶³ August 24, 2020 Requests for Reconsideration at TSDR 13-15 (Louisville, Kentucky).

⁶⁴ Applicant’s argument is directed to the claimed conceptual weakness of the word CLOVER in connection with restaurant services. The cited registrations of CLOVER issued on the Principal Register without a showing of acquired distinctiveness, indicating that the USPTO found that the word is inherently distinctive as a mark for restaurant services. *See* 15 U.S.C. § 1057(b); *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (when a mark is

with good luck, but in some uses the word “clover” plainly connotes something else.

The use of The Clover Station (shown below),



65

and one of the uses of Clover Grill, refer to the city of Clover, South Carolina,⁶⁶ and

the use of 211 Clover Lane (shown below)



67

refers to a street address in Louisville, Kentucky. The use of Clover’s Fine Art Gallery in Brooklyn New York focuses on the gallery’s cafe’s “Clover Machine,”⁶⁸ also referred to as “The Clover Brewer,”⁶⁹ which brews coffee, and the webpages provide a picture of the machine and a link to “a short video about how the Clover Brewer works.”⁷⁰

registered on the Principal Register, “we must assume that it is at least suggestive.”). We will consider Applicant’s evidence of third-party uses on the issue of the commercial strength of the cited mark.

⁶⁵ *Id.* at TSDR 10.

⁶⁶ *Id.* at TSDR 11.

⁶⁷ *Id.* at TSDR 13-15.

⁶⁸ *Id.* at TSDR 27-29.

⁶⁹ *Id.* at TSDR 29.

⁷⁰ *Id.*

Because the word “Clover” in these marks does not connote good fortune or luck, but instead refers to something quite different, these marks are less similar to the cited CLOVER standard-character mark than the third-party marks were to the opposer’s marks in *Juice Generation*. They have less probative value regarding the commercial weakness of the cited CLOVER mark.

Three other uses involve composite word-and-design marks containing multiple elements in addition to the word CLOVER:



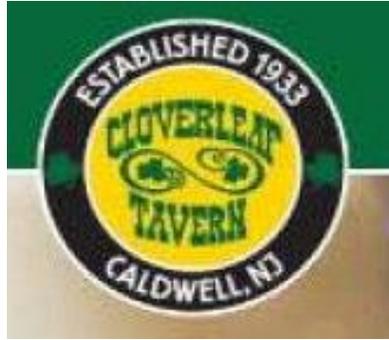
71



72

⁷¹ *Id.* at TSDR 75.

⁷² *Id.* at TSDR 77.



73

Because these marks contain significant verbal and graphic elements in addition to the word CLOVER, they too are less similar to the cited CLOVER standard-character mark than the third-party marks were to the opposer's marks in *Juice Generation*. They also have less probative value regarding the commercial weakness of the cited CLOVER mark.

The third-party marks that are identical or the most similar to the involved marks CLOVER and CLOVER CLUB are CLOVER alone (five uses, counting THE CLOVER) and CLOVER CLUB (five uses, counting THE CLOVER CLUB), for a total of 10 such marks. The other uses have varying lesser degrees of similarity to the cited CLOVER mark, and discounting the seven uses discussed immediately above, the universe of uses with the greatest probative value amounts to slightly fewer than 20 uses. That is still a significant number in light of *Juice Generation* and *Jack Wolfskin*.⁷⁴ We find that the 10 identical or very similar third-party CLOVER-

⁷³ *Id.* at TSDR 73.

⁷⁴ A much larger number of third-party uses was cited in two pre-*Juice Generation* cases involving marks for restaurant services in which the Board found that third-party uses weakened the involved mark. In *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1560-65 (TTAB 1996), trademark search reports and telephone directories showing hundreds of entities providing restaurant services under a mark beginning with BROADWAY supported findings that “a significant number of third parties are using trade names/service marks containing the term BROADWAY for restaurant/‘eating place’ services, as well as for goods

formative marks for restaurant services, and the other less similar, but still probative, uses of CLOVER-formative marks, together render the cited mark CLOVER weak for restaurant services on the “spectrum from very strong to very weak.” *Juice Generation*, 115 USPQ2d at 1676 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).⁷⁵ The sixth *DuPont* factor thus weighs against a finding of a likelihood of confusion.

and services related thereto,” and that the marks BROADWAY CHICKEN and BROADWAY PIZZA were not confusingly similar when used for restaurant services. In *Anthony’s Pizza & Pasta*, 95 USPQ2d at 1277-78, testimony regarding 29 third-party uses of ANTHONY’S for pizza restaurants, third-party registrations of ANTHONY’S, TONY’S, and ANTONIO’S for restaurants, and evidence of telephone directory listings “for numerous restaurants listed under variations of the name ‘Anthony’s’ in cities located throughout the United States” collectively established “that the name ‘Anthony’s’ has been extensively adopted, registered and used as a trademark for restaurant services, in particular for Italian restaurants and pizzerias, and therefore that ‘Anthony’s’ has a significance in this industry.” In light of *Juice Generation* and *Jack Wolfskin*, showings of this magnitude are not required to establish that an involved mark is weak if there are a sufficient number of identical or very similar third-party uses in the record. The sheer number of uses may matter, however, to the extent that the record contains a relatively small number of identical or very similar uses, but a very large number of somewhat similar uses. See *Primrose Ret. Cmtys.*, 122 USPQ2d at 1034-37 (the opposer’s PRIMROSE mark was not entitled to a broad scope of protection where the record showed 13 uses of PRIMROSE marks, and more than 80 uses of various ROSE-formative marks, for senior living communities).

⁷⁵ In its supplemental brief, Applicant cites *In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150 (TTAB 2012), as support for its argument that the number and nature of similar marks in use for similar services in this case are sufficient to show that confusion is not likely. 28 TTABVUE 5-6. Applicant’s reliance on *Hartz Hotel* is misplaced. In that case, the Board found that the marks GRAND HOTELS NYC and GRAND HOTEL were sufficiently dissimilar to avoid a likelihood of confusion, even though both were used for identical hotel services, on the basis of a dictionary definition of the word “grand” as “impressive in size, appearance or general effect,” “stately, majestic, or dignified,” “magnificent or splendid,” and “first-rate; very good; splendid,” and five third-party registrations and 17 third-party uses of GRAND HOTEL- or GRANDE HOTEL-formative marks for hotel services. The Board emphasized “the highly suggestive nature of the term ‘Grand Hotel’” in multiple places in its opinion, and also noted that the USPTO had issued several registrations of GRAND-formative marks for hotel services, which allowed the Board to infer that the USPTO “view[ed] these marks as being sufficiently different from the cited registrant’s mark, and from each other, such as not to cause confusion,” and that “the owner of the cited registration did not have a problem with the registration of these third-party marks as they all issued after the registration of the cited registrant’s registration without challenge by the

C. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *In re Embiid*, 2021 USPQ2d 577, at *11 (TTAB 2021) (quoting *Palm Bay Imps.*, 73 USPQ2d at 1691). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *Inn at St. John’s*, 126 USPQ2d at 1746 (quoting *In re Davia*, 110 USPQ2d 1801, 1812 (TTAB 2014))).

“The proper test regarding similarity ‘is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.’” *Id.* (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted)).

“The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)). Because restaurant services are purchased by the general public, the average customer here is an ordinary consumer.

registrant.” *Hartz Hotel*, 102 USPQ2d at 1153-54. Here, there is no dictionary or other evidence that the word “clover” is “highly suggestive” for restaurant services, and the record contains only one registration of a CLOVER-formative mark for restaurant services, which is insufficient to show that “clover” “has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation*, 115 USPQ2d at 1675. As discussed above, however, we have found that the third-party uses in the record render the cited CLOVER mark commercially weak, and narrow the ambit of its protection.

Our findings above on the second and sixth *DuPont* factors pull us in opposite directions in our analysis under the first *DuPont* factor. On the one hand, because the involved services are legally identical, the degree of similarity between the cited CLOVER mark and each of Applicant's CLOVER CLUB-formative marks that is required for confusion to be likely declines. *See, e.g., Bridgestone Americas Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012) (“When the goods are identical, the appearance of a mark of similar sound, appearance, or connotation is more likely to cause confusion than if the goods are significantly different.”); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate*, 23 USPQ2d at 1700.

On the other hand, we have found that the cited CLOVER mark is commercially weak for restaurant services, which means that each of Applicant's CLOVER CLUB-formative marks can be more similar to the cited mark “without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection” than if the cited mark were not surrounded by multiple third-party uses of identical, nearly identical, or somewhat similar CLOVER-formative marks. *Juice Generation*, 115 USPQ2d at 1674. In assessing the similarity or dissimilarity of the marks, we must apply the Federal Circuit's instruction that “sufficient evidence of third-party use of similar marks ‘can show that customers . . . have been educated to distinguish between different . . . marks on the basis of minute distinctions.’” *Id.* (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:88 (4th ed. 2015)).

To thread this needle, we must carefully examine the similarity of the cited CLOVER standard character mark to each of Applicant's marks, which are CLOVER CLUB alone in standard characters and three marks containing CLOVER CLUB as well as other literal and visual elements.

The marks must be compared in their entirety, but "in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety." *Detroit Athletic Co.*, 128 USPQ2d at 1050 (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). Because Applicant argues that the Examining Attorney gives undue weight to the word CLOVER in each of its marks, and "inadequate consideration to Applicant's wording 'CLOVER CLUB' and additional elements in certain of Applicant's Marks, which are not present in the Cited Marks," 21 TTABVUE 26, we will begin by determining the dominant portion of Applicant's marks.

Applicant has disclaimed the exclusive right to use the word CLUB in all of its marks. Nevertheless, Applicant argues, without any evidentiary support, that the "additional term 'club' makes it clear that Applicant's establishment is not merely a restaurant, but instead a lounge with a 'club-like' atmosphere, thereby distinguishing it from the Cited Marks and the services offered thereunder." *Id.* A dictionary definition proffered by Applicant in its reply brief, however, defines "club" simply as "a place that people go to in order to dance and drink in the evening," and gives the

following sentence as an example of use: “I went to that new club that’s just opened.”

33 TTABVUE 17 (CAMBRIDGE DICTIONARY). This definition, together with various third-party webpages of restaurants with the word CLUB in their marks,⁷⁶ establishes that the word “club” has little, if any, source-identifying significance in connection with restaurant services, and was appropriately disclaimed in each of Applicant’s applications, because “club” merely describes a venue where restaurant services may be rendered. *Cf. Dixie Rests.*, 41 USPQ2d at 1533-34 (Board properly found that DELTA was the dominant portion of applicant’s mark THE DELTA CAFE and design where the applicant “disclaim[ed] the generic word ‘cafe’”); *Chutter*, 2021 USPQ2d 1001, at *36 (finding that “DANTANNA’S is the dominant portion of the mark DANTANNA’S TAVERN because the word ‘tavern’ is a generic term for . . . restaurant and bar services, and [the applicant] has accordingly disclaimed the exclusive right to use the word ‘tavern.’”); *Binion*, 93 USPQ2d at 1534 (BINION’S found to be the clear dominant portion of cited BINION’S ROADHOUSE mark for restaurant services where “registrant disclaimed the word ROADHOUSE” because it was generic or merely descriptive of the services).

In all of Applicant’s marks, CLOVER is an adjective that modifies the noun CLUB, and in Applicant’s standard-character mark, CLOVER is the “first term in the mark, further establishing its prominence.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1185 (TTAB 2018) (citing *Palm Bay Imps.*, 73 USPQ2d at 1692; *Presto Prods.*

⁷⁶ January 30, 2020 Response to Office Action at TSDR 66-69; August 24, 2020 Request for Reconsideration at TSDR 9.

Inc. v. Nice-Pak Prods., Inc., 9 USPQ2d 1895, 1897 (TTAB 1988)). We find that CLOVER is the dominant element of Applicant's CLOVER CLUB standard-character mark.

In Applicant's other marks, the words CLOVER CLUB are by far the largest and most prominent elements, and Applicant has disclaimed the other literal elements consisting of the phrases "Made in Texas" and "Estd. 2019," which, like CLUB, have at best limited source-identifying capability. We find that the word CLOVER is the dominant portion of these marks as well. *Cf. Aquitaine Wine USA*, 126 USPQ2d at 1184-85 (finding that the word LAROQUE was the dominant portion of the applicant's composite mark because of its size and prominence in the mark and because the additional wording "'Cité de Carcassonne' is a geographically descriptive term, is in significantly smaller lettering, and has been disclaimed."). We turn now to the required comparison of the marks in their entireties, giving greater weight in that comparison to the word CLOVER in Applicant's marks than to the other elements of the marks.

1. CLOVER CLUB in Standard Characters

Applicant's standard-character mark CLOVER CLUB contains the entirety of the cited mark CLOVER and adds to it the descriptive and disclaimed word CLUB. We have found above that CLOVER is the dominant portion of this mark, and "that dominant portion is identical to the registered mark." *Dixie Rests.*, 41 USPQ2d at 1534. While there is no rule that likelihood of confusion exists where the entirety of one mark is incorporated within another, it has frequently been found in cases involving such marks. *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d

377409, at *6-7 (TTAB 2019) (citing *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1660 (TTAB 2014)); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (BARR GROUP found to be confusingly similar to BARR because “BARR GROUP wholly encompass[ed] the registered mark BARR, the only difference being the addition of the nondistinctive term GROUP to Applicant’s mark, which, as discussed above, is disclaimed and descriptive of Applicant’s services”); *In re Denisi*, 225 USPQ 624, 625-26 (TTAB 1985) (PERRY’S PIZZA for restaurant services specializing in pizza found to be confusingly similar to PERRY’S for restaurant and bar services because “should the PERRY’S registrant now operate or operate in the future a restaurant specializing in pizza, there is nothing in the trademark law to interfere with its freedom to use the descriptive term ‘pizza’ (i.e., ‘PERRY’S pizza’) in connection with the offering of its services.”). “[I]f a junior user takes the entire mark of another and adds a generic, descriptive or highly suggestive term, it is generally not sufficient to avoid confusion,” *Double Coin Holdings*, 2019 USPQ2d 377409, at *7, and we find that it is not sufficient here.

The CLOVER and CLOVER CLUB standard-character marks are very similar in appearance, sound, and connotation and commercial impression because the dominant portion of Applicant’s standard-character mark CLOVER CLUB is identical to the cited CLOVER mark.⁷⁷ See *Dixie Rests.*, 41 USPQ2d at 1534 (finding

⁷⁷ Moreover, because Applicant’s mark is a standard-character mark, we must assume that it “could be used in any typeface, color, or size, including the same stylization actually used or intended to be used by [Registrant], or one that minimizes the differences or emphasizes the similarities between the marks.” *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1823 (TTAB 2015). Accordingly, we must assume that Applicant could display

that “[b]ecause the dominant portion of THE DELTA CAFE and design is identical to the DELTA mark, and because the two marks are for identical services, the two marks are likely to cause confusion.”). Like the registrant in *Denisi*, the Registrant here could elect to expand its business under its CLOVER mark, in this instance by opening a “club” through which to provide its restaurant services, and Applicant’s CLOVER CLUB mark could easily be understood as reflecting that expansion into the specific restaurant services identified in the application. *See Double Coin Holdings*, 2019 USPQ2d 377409, at *7 (“ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR.”). We find that the standard-character CLOVER CLUB mark is quite similar to the cited standard-character CLOVER mark, even against the backdrop of multiple third-party uses of CLOVER, CLOVER CLUB, and other CLOVER-formative marks for restaurant services. The first *DuPont* factor supports a finding of a likelihood of confusion as to Applicant’s standard-character mark.

2. ESTD. CLOVER CLUB 2019 & Design Mark⁷⁸

Applicant’s first non-standard character mark is shown again below for ease of reference in following our analysis:

the standard-character CLOVER CLUB mark in a manner that emphasizes the word CLOVER over the word CLUB.

⁷⁸ For convenience in following our analysis, we have described Applicant’s non-standard character marks using Applicant’s descriptions of them in its appeal brief. 21 TTABVUE 2. Our uses of these shorthand references do not reflect an assessment of the relative importance of the different elements of the marks in our determination of how they will be perceived.

Estd. CLOVER CLUB 2019

Because the cited CLOVER mark “is a standard character mark, we must consider that [it] may be presented in any font style, size or color, including the same font, size and color as the literal portions of Applicant’s mark.” *Aquitaine Wine USA*, 126 USPQ2d at 1186. Accordingly, we must assume that the cited mark could be presented as follows:

CLOVER

A consumer with a general rather than specific impression of the cited mark displayed in this manner who separately encounters Applicant’s mark may not notice the differences in appearance between the marks arising from the presence of the peripheral elements “Estd.” and “2019” in what Applicant describes as “smaller stylized font,” which bookend what Applicant describes as “the stylized words ‘CLOVER CLUB’ vertical in large block letters.” We therefore find that these marks are more similar than dissimilar in appearance. We also note, in regard to such a consumer, that the theoretical display of the cited standard-character mark became more than theoretical when Registrant obtained its second registration for its stylized CLOVER mark. Consumers familiar with that mark and the expansion by Registrant to that particular font may be more inclined to confuse Applicant’s mark with Registrant’s mark.

With respect to sound, which is particularly significant here “because restaurants are often recommended” and tried by consumers based on word-of-mouth endorsements, and are “referred to orally,” *Dixie Rests.*, 41 USPQ2d at 1534 (quoting *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)), Applicant’s mark is likely to be verbalized simply as CLOVER CLUB, which is quite similar in sound to CLOVER alone.

With respect to meaning, the dominant portion of Applicant’s mark, the word CLOVER, “is identical to the registered mark,” *id.*, and neither the disclaimed word CLUB nor the disclaimed phrase “Estd. 2019” “offers[] sufficient distinctiveness to create a different commercial impression” from the cited mark. *Id.* To the contrary, in the context of the mark as a whole, the phrase “Estd. 2019” could be viewed simply as identifying the year in which Registrant first opened a CLOVER “club.” We find that the first *DuPont* factor supports a finding of a likelihood of confusion with respect to this non-standard-character mark.

3. Made in Texas Clover Club Mark

Applicant’s second non-standard-character mark is shown again below for ease of reference in following our analysis:



We again must assume that the cited standard-character mark CLOVER could be displayed as follows:



Applicant's mark contains a design element as well as the words MADE IN TEXAS, which refer, somewhat tongue in cheek, to the geographic source of Applicant's services. While basic geometric shapes containing words generally do "not create a separate commercial impression but serve[] merely as a carrier for the words," *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013), against the backdrop of the third-party CLOVER-formative marks discussed above, the circle carrier here and the enclosed words MADE IN TEXAS help to differentiate Applicant's mark somewhat from the cited standard-character mark in appearance.

The marks are similar in sound because Applicant's mark is likely to be verbalized simply as CLOVER CLUB rather than as CLOVER CLUB MADE IN TEXAS. *See, e.g., Aquitaine Wine USA*, 126 USPQ2d at 1188 (noting "that consumers often have a propensity to shorten marks when ordering them orally" and finding that consumers may order the registrant's wines "under the designation LAROQUE alone" without including the appellation of origin "Cité de Carcassonne" that also appeared in the cited mark); *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (noting the "penchant of consumers to shorten marks" and finding that consumers may order the applicant's TIME TRAVELER BLONDE using the words TIME

TRAVELER alone and “drop[ping] the highly descriptive/generic term ‘Blonde’ when calling for Applicant’s goods”).

With respect to meaning, we must consider the impact of the disclaimed words MADE IN TEXAS and assess whether they create a distinct commercial impression that detracts from the similarity of CLOVER and CLOVER CLUB in connotation. As the Federal Circuit reiterated in *Juice Generation*, marks must always be considered in their entireties, including their disclaimed portions, which “may convey a distinct meaning—including by having different connotations in consumers’ minds” from the senior mark. *Juice Generation*, 115 USPQ2d at 1676 (criticizing the Board’s determination that the marks PEACE & LOVE and PEACE LOVE AND JUICE were confusingly similar because “the additional disclaimed word ‘JUICE’ . . . do[es] not serve to sufficiently distinguish” the marks). This admonition is particularly important here, as it was in *Juice Generation*, where there are multiple third-party uses of CLOVER-formative marks for restaurant services. The disclaimed tongue-in-cheek phrase MADE IN TEXAS imbues this CLOVER CLUB-based mark with a geographic connotation, and a connotation of club-type food that would be typical of Texas. Although Applicant’s mark has similarities to the cited standard-character mark, the first *DuPont* factor does not support a finding of a likelihood of confusion given the large number of third-party uses of CLOVER, CLOVER CLUB, and other CLOVER-formative marks for restaurant services.

4. Made in Texas Clover Club Estd. 2019 Mark

Applicant’s third non-standard character mark is shown again below for ease of reference in following our analysis:



This mark contains the words CLOVER CLUB in the font in Applicant’s first non-standard character marks discussed above, as well as the phrases “Made in Texas” and “ESTD. 2019” that appear separately in both of Applicant’s other non-standard-character marks. We must assume once again that the cited CLOVER standard-character mark could appear in the same font as the word CLOVER in Applicant’s mark.

We find that Applicant’s mark is similar to the cited mark in appearance and sound for essentially the reasons discussed above in connection with Applicant’s other two non-standard-character marks. With respect to meaning, however, we find that Applicant’s mark is imbued with a sense of geography and Texas club-type food, as well as newness, and that while the mark has some similarities to the cited standard-character CLOVER mark, the first *DuPont* factor does not support a finding of a likelihood of confusion when the record reveals so many third-party uses of CLOVER, CLOVER CLUB, and other CLOVER-formative marks for restaurant services.

D. Conditions of Purchase and Consumer Sophistication

The fourth *DuPont* factor “considers ‘[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.’” *Embiid*, 2021 USPQ2d 577, at *31 (quoting *DuPont*, 177 USPQ at 567). In considering this

factor, we must look to the identifications of services in the cited registration and the four applications rather than to extrinsic evidence of the actual use of the involved marks. *Id.*, at *32-33. The applicable standard of purchaser care is that of the least sophisticated potential purchaser of the identified services. *Stone Lion Capital Partners, LP v. Lion Capital LLC*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014).

Applicant argues in its appeal brief that “[p]otential consumers of restaurant services and foods are sophisticated and savvy in selecting their food and dining choices.” 21 TTABVUE 27. “These assertions are unsupported by sworn statements or other evidence, and ‘attorney argument is no substitute for evidence.’” *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at *15 (TTAB 2019) (quoting *Cai*, 127 USPQ2d at 1799 (internal quotation omitted)). Applicant’s argument is based instead on one federal court case, *Brennan’s, Inc. v. Brennan’s Rest.*, 2003 U.S. Dist. WL 133861, at *5 (S.D.N.Y. 2003), *aff’d*, 360 F.3d 125, 69 USPQ2d 1939 (2d Cir. 2004), and one Board decision, *In re Homeland Vinyl Prods., Inc.*, 81 USPQ2d 1378 (TTAB 2006). *Id.* These cases do not support Applicant’s sweeping claim.

Homeland Vinyl involved fence rails, not restaurant services. The Board found that “fence rails are not impulse purchases and the construction and installation of a fence would require some level of knowledge and experience,” such that the Board “would expect that such purchasers would exercise a relatively high degree of care in their purchasing decisions.” *Homeland Vinyl*, 81 USPQ2d at 1380. The case does not support a finding that “[p]otential consumers of [unrestricted] restaurant services

and foods are sophisticated and savvy in selecting their food and dining choices.” 21 TTABVUE 27.

The *Brennan’s* case cited by Applicant did involve restaurants, but we are not bound by federal court decisions in trademark infringement cases, and the decision is distinguishable in any event. In denying a preliminary injunction against the use of the mark BRENNAN’S SEAFOOD & CHOP HOUSE by a restaurant in Manhattan, the district court focused on the record evidence regarding the nature of the two dueling expensive restaurants in finding that

New York City restaurant patrons prepared to pay the sort of prices charged in both of the restaurants involved in this case are largely sophisticated, and many of them will, no doubt, have acquaintance with the very substantial media coverage received by restaurants and well known chefs in New York City, which is likely to prevent confusion, or, if there is incipient confusion, quickly disabuse it.

Brennan’s, 2003 U.S. Dist. WL 133861, at *5.⁷⁹

Brennan’s is inapposite because under the fourth *DuPont* factor, our “analysis must be made on the basis of the goods and services as they are identified in [A]pplicant’s application, i.e., [“restaurant services, namely, providing cocktails and small dishes in an outdoor lounge setting attached to a high-end hotel”] and in [R]egistrant’s registration, i.e., [“restaurant services”], regardless of what the evidence might show as to the nature of [A]pplicant’s and [R]egistrant’s actual . . . services.” *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001). Registrant’s

⁷⁹ On appeal, the Second Circuit characterized this finding as follows: “[D]iners in the high-end restaurants tend to be sophisticated, and thus less likely to be confused.” *Brennan’s*, 69 USPQ2d at 1942.

“restaurant services’ therefore must be presumed to encompass inexpensive or moderately-priced restaurant services.” *Id.* “There is no evidence in the record from which we might conclude that . . . restaurant services, in general, are necessarily expensive, or that purchasers thereof are necessarily sophisticated and careful in making their purchasing decisions.” *Id.*

The Examining Attorney attempts to distinguish *Brennan’s* on the ground that “there is no evidence of record or assertion proffered by the Applicant that the restaurant services of either party are ‘high end restaurants.’” 30 TTABVUE 21. That argument is inaccurate because Applicant has both argued and tried to show that its “Clover Club establishment is connected to Applicant’s high-end hotel in Arlington, Texas, and is a higher-end establishment because of the price point of Applicant’s hotel, restaurant and lounge.” 33 TTABVUE 8.

Applicant also argues in its appeal brief that the “purchasers of the restaurant services and/or food products offered by Applicant and those of the owners [sic] of the Cited Marks are sophisticated purchasers” who “can easily recognize the difference in restaurants, food services and food products that they are consuming, particularly where, as here, there are so many other restaurants offered by ***different sources*** containing the mark CLOVER.” 21 TTABVUE 27 (emphasis supplied by Applicant). This argument addresses the wrong inquiry. “The issue, of course, is not whether the purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of the services.” *Binion*, 93 USPQ2d at 1535.

In its reply brief, Applicant argues that the Examining Attorney ignores Applicant's evidence that its restaurant "is a higher-end establishment because of the price point of Applicant's hotel, restaurant and lounge," including evidence in the form of "a copy of Applicant's consumer-facing food and beverage menu, depicting marketing images of an upscale lounge reminiscent of the 1950s, with high-end and higher price points for small dishes and cocktails." 33 TTABVUE 8.⁸⁰

As noted above, we must consider the sophistication of the least sophisticated potential purchasers of restaurant services identified as "providing cocktails and small dishes in an outdoor lounge setting attached to a high-end hotel," which is, to say the least, a unique identification of services, but not one that includes "high-end" restaurant services or prices. We will consider Applicant's evidence to the extent that it is probative of the degree of care that is likely to be exercised by purchasers of those identified services.

Applicant's website describes its services as follows:

⁸⁰ Applicant also argues that the Examining Attorney ignores its evidence "submitted with its First Office Action showing consumers of the Cited Marks are likewise sophisticated." 33 TTABVUE 8. That evidence is "legally irrelevant and cannot be considered in our likelihood of confusion analysis," *Opus One*, 60 USPQ2d at 1817, because Applicant cannot restrict the scope of the "restaurant services" identified in the cited registration by extrinsic evidence of Registrant's alleged "focus on vegetarian and vegan food." 33 TTABVUE 8. *See Jansen Enters.*, 85 USPQ2d at 1108 (in determining the scope of the respondent's "restaurant services," "the fact that respondent sells only kosher foods is of no moment.") (citing *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986)).

Happy Hour with a view. Beers with friends. A swanky cocktail hour to wow your date. It's all possible at Clover Club, our dramatic outdoor lounge. Soaring columns frame the bar like a stage—and your stool at the up-lit bar gives you a front row view of the AT&T Stadium. Our menu showcases the best craft beers from here in Texas and around the country, along with creative cocktails. Of course, if a glass of wine enjoyed al fresco is on your agenda, we've got you covered, too. Shareable snacks and small plates include crowd favorites like charcuterie boards, sliders and spring rolls, as well as light bites such as a carpaccio crostini.

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Applicant's website also contains pages from its menu that indicate that its small plates are priced between \$8 and \$24,⁸² and that its cocktails, beers, still and sparkling wines, and spirits range in per-serving price from \$6 for a beer to \$28 for a rye whiskey.⁸³ There is nothing beyond argument of counsel to support Applicant's claim that these prices are at "high-end and higher price points for small dishes and cocktails." 33 TTABVUE 8. They strike us instead as prices that could be paid by a substantial portion of the consuming public, not just patrons of expensive restaurants.

In addition, Applicant's description of its restaurant on its website is directed to the general public, not simply to guests at Applicant's "high-end hotel," because it solicits the business of people on dates, people who want to have "[b]eers with friends," and people seeking "crowd favorites like charcuterie boards, sliders and spring rolls."⁸⁴

⁸¹ January 30, 2020 Responses to Office Actions at TSDR 79.

⁸² *Id.* at TSDR 81.

⁸³ *Id.* at TSDR 82-85.

⁸⁴ August 30, 2020 Responses to Office Action at TSDR 79.

As noted above, the Examining Attorney also made of record pages from the website of Applicant’s hotel and restaurants in Arlington, Texas, including the Clover Club restaurant.⁸⁵ As shown below, Applicant’s website states that the “common thread” between its several hotel restaurants, including “the more casual setting[] of Arlington Clover Club,” is that they offer “[a]pproachable, affordable American fare”:

Dine + Drink

Savor the Flavors of Texas + Beyond

Approachable, affordable American fare prepared with the freshest ingredients. That’s the common thread between our beautiful new restaurants and bars, including our signature restaurant, Cut & Bourbon. Opt for the more casual settings of Arlington Clover Club, our SOAK pool bar or our grab-and-go spot River Market, and you can still count on culinary excellence and service with a smile.

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Applicant’s CLOVER CLUB restaurant is further described and displayed as follows:

Arlington Clover Club

Our modern outdoor lounge will up the ante on your happy hour or nightcap game, with soaring columns and a striking view of the AT&T Stadium. The menu of light bites, craft beer, wine and handcrafted cocktails is just as likely to impress.



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⁸⁵ September 14, 2020 Denials of Requests for Reconsideration at TSDR 2-11.

⁸⁶ *Id.* at TSDR 2.

⁸⁷ *Id.* at TSDR 4.

The advertisement is a rectangular graphic with a blue background. On the left, the word "Men" is written in large white letters. Below it, there is a paragraph of text: "Thirsty? Say no more. Enjoy the sights and sounds of AT&T Stadium with our extensive selection of local craft beers, creative cocktails and flavorful wines." followed by "Looking for a bite? We like to keep it social at Clover Club. Our menu has you covered on your favorite light bites and small plates that are perfect for sharing." Below this text is a link that says "View Menu". On the right side of the graphic is a black and white photograph of a woman with blonde hair, wearing a light-colored dress, looking towards the camera. She is surrounded by several hands holding wine glasses, some of which are being raised as if in a toast. At the bottom of the graphic, there is a black bar containing the text "@ArlingtonCloverClub" with a Facebook icon, "1600 E RANDOL MILL RD" in large white letters, and "Give us a call (682) 277-4958". A small number "88" is located in the bottom right corner of the graphic.

On the basis of Applicant’s identification of services, and the evidence of the nature of the identified services made of record by both Applicant and the Examining Attorney, we find that restaurant services identified as “providing cocktails and small dishes in an outdoor lounge setting attached to a high-end hotel” may offer “affordable” fare and that consumers of those services may include members of the general public. The least sophisticated potential purchaser of those services will not exercise anything more than ordinary care in purchasing.

We find that the fourth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

E. Balancing the *DuPont* Factors

The second and third *DuPont* factors support a finding of a likelihood of confusion because the services and channels of trade are legally identical. The sixth *DuPont*

⁸⁸ *Id.* at TSDR 11.

factor supports a finding of no likelihood of confusion. The fourth *Du Pont* factor is neutral.

The key issue in the balancing of these *DuPont* factors is whether “the strength or weakness of the mark in the cited registration is the most important factor,” *Hartz Hotel*, 102 USPQ2d at 1115, that is, whether the number and nature of the third-party CLOVER-formative marks in the record is sufficient to show that consumers of the legally identical restaurant services can distinguish between the cited standard-character CLOVER mark and Applicant’s several CLOVER CLUB-formative marks based on the differences between those marks discussed above. As discussed above, we conclude that Applicant’s standard-character CLOVER CLUB mark and stylized CLOVER CLUB Est. 2019 mark, and the cited standard-character CLOVER mark, are so similar that confusion is likely notwithstanding the third-party CLOVER-formative marks in the record, but that those third-party marks are sufficient in quantity and quality to show that consumers will be able to distinguish between the cited standard-character mark CLOVER and the other two of Applicant’s non-standard-character CLOVER CLUB marks based on the relatively “minute distinctions” between those marks. *Juice Generation*, 115 USPQ2d at 1674.

Decision: The refusals to register are affirmed as to the marks shown in Application Serial Nos. 88425357 and 88433338. The refusals to register are reversed as to the marks shown in Application Serial Nos. 88433342 and 88433348.